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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 684

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

RICHARD J. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 28) is reported in 41 B. T. A. 59. The opinion of the Circuit Court of Appeals (R. 41) is reported in 114 F. (2d) 804.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 7, 1940. (R. 55.) The petition for a writ of certiorari was filed on January 7, 1941, and was granted on February 17, 1941. (R. 57.) The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to a testamentary trust established under the will of the taxpayer's father, the taxpayer's share was distributed to him when he became 28 years of age. He thus received not only securities formerly owned by the decedent but also other securities purchased by the trustee. During the year 1934, the taxpayer sold securities of both groups, and the questions presented relate to the proper basis for determining gain or loss upon these sales, namely:

1. Whether, under Section 113 (a) (5) of the Revenue Act of 1934, and the regulations promulgated thereunder, the basis of the first group of securities is their value at the date of decedent's death, rather than their value at the date of delivery by the trustee to the taxpayer when he became 28 years of age; and
2. Whether the basis of the second group of securities is their cost to the trustee rather than their value at the date of delivery by the trustee to the taxpayer.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra*, pp. 32-34. 31-33

STATEMENT

Taxpayer is the beneficiary under a trust created by the will of his father who died July 19, 1918.

(R. 24.) By his will,¹ the father provided that the residue of his estate should be divided, one-third to his wife absolutely (with certain qualifications), and the remaining two-thirds to his children and the living issue of any deceased child, *per stirpes*, to be equally divided among them, share and share alike, subject, however, to the conditions of a specified trust. (R. 16.)

Under the trust created for the benefit of the children the trustee was directed to collect the income and, until they severally arrived at the age of 21, to pay to the wife, out of their respective shares, so much as she deemed necessary or requisite for their support, maintenance, and education. (R. 17.) The trustee was given similar discretion in the event that the wife should die before any of the children should become 21. (R. 17.)

The will then provided that after each child arrived at the age of 21 and until they respectively attained the age of 28, the trustee was authorized and directed to pay to each of them, out of his or her respective share, \$5,000 per annum, unless, in the opinion of the wife, that amount was inade-

¹ For convenience, all references herein to the will are to the extracts therefrom in Exhibit B attached to the taxpayer's petition filed with the Board of Tax Appeals. (R. 16.) The will is set out in full in Exhibit A, which is referred to in paragraph 8 of the Stipulation of Facts. (R. 24.) Since Exhibit A is voluminous, it was stipulated by the parties on December 27, 1940 (R. 56), that it need not be printed but that it be separately certified and as such made a part of the record by reference.

quate. In that event, at the written request of the wife, the trustee was authorized and directed to enlarge the annual payment by whatever amount the wife designated, not in excess of \$50,000. (R. 17.)

Should the wife die while any of the children were between the ages of 21 and 28, the trustee was authorized to pay to each child \$50,000 per annum. The balance of the income was to be accumulated until each child was 28, at which time the trustee was directed to pay his or her share of the corpus of the estate, together with the accumulated income. (R. 17-18.)

In the event that any child should die before arriving at the age of 28, such child was in effect given a general testamentary power of appointment over his or her share. (R. 18.) Provision was then made for other disposition in the event of default of exercise of the power of appointment. (R. 18-19.)

The trustee received the trust assets from the estate in 1926 and distributed the taxpayer's share, including securities, to him on April 4, 1934, when he became 28. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been acquired by the trustee in intermediate transactions. Taxpayer sold some of the securities during the year 1934 at a profit. In computing gain, he used as the basis the value on April 4, 1934, when he received them from the trustee. (R. 28.)

The Commissioner determined that the proper basis was the value of the securities at the time of the father's death in the case of those then held by the father, and their cost to the trustee in the case of those which it had acquired thereafter. (R. 10.)

The Board of Tax Appeals sustained the Commissioner's determination. (R. 29.) On appeal to the Circuit Court of Appeals the decision of the Board was reversed. (R. 55.)

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the basis for the determination of the taxpayer's gain or loss upon the sale by him in the taxable year 1934 of securities which were distributed to a testamentary trustee under the terms of his father's will and by the trustee to the taxpayer as a part of his share under the will when he became 28 years of age was their value at the date of the distribution to him.

2. The court below erred in holding that the basis for the determination of the taxpayer's gain or loss upon the sale by him in the same taxable year of securities which were acquired by the trustee in intermediate transactions but were likewise distributed to the taxpayer by the trustee as a part of the taxpayer's share under the will when he reached the age aforesaid was their value at the time of their distribution to the taxpayer aforesaid.

3. The court below erred in reversing the decision of the Board of Tax Appeals which had af-

firmed the Commissioner's determination that the taxpayer's basis for gain or loss upon the sale by him in the taxable year of the securities mentioned in the first specification of error was their value at the time of his father's death and that the basis for gain or loss upon the sale by the taxpayer in that year of the securities mentioned in the second specification of error was their cost to the trustee.

4. The court below erred in invalidating or failing to give effect to Article 113 (a) (5)-1 of Treasury Regulations 86.

SUMMARY OF ARGUMENT

I. For securities which had been owned by the decedent, the time of acquisition by the taxpayer, under Section 113 (a) (5) of the Revenue Act of 1934, was the date of the testator's death.

Section 113 (a) (5) of the Revenue Act of 1934 provides that where property is "acquired by bequest, devise, or inheritance", the basis for computing gain or loss "shall be the fair market value of such property at the time of such acquisition."

Treasury Regulations 86, Appendix, *infra*, pp. 32- 31-

33 34, interpreting this provision, hold that the "time of such acquisition" is the date of death of the decedent, regardless of whether the interest of the taxpayer was "vested" or "contingent" at such time. The taxpayer and the court below conceded that if the interest acquired by the taxpayer was "vested" the date of "acquisition" would be the date of the testator's death but asserted that the

interest was "contingent" under North Carolina law and that therefore the time of acquisition was the date when such contingency was finally resolved by actual delivery of the *corpus* to the taxpayer.

The legislative history of Section 113 (a) (5) makes clear that no such distinction between "vested" and "contingent" interests was contemplated by Congress. On the contrary, it is apparent that Congress intended the date of the decedent's death to govern in all cases of property passing by bequest, devise, or inheritance, regardless of the nature of the taxpayer's interest as remainderman.

The issue is now conclusively settled by the recent decisions of this Court in *Maguire v. Commissioner*, No. 346 this Term, which proceeded upon the theory that the "time of . . . acquisition" in the Revenue Acts prior to 1928 and subsequent to 1932 meant the date of the testator's death even where the taxpayer's interest was conditional or contingent; in *Helvering v. Gumbrell*, No. 472 this Term, which ruled that the two-year holding period for the purpose of determining capital assets is to be measured from the date of the decedent's death despite an intervening trust similar to that in the case at bar; and in *Helvering v. Campbell* and related cases, Nos. 473, 474, and 475 this Term, which ruled that the date of acquisition for purposes of the "first-in-first-out" rule was the date of the decedent's death, again irrespective of whether the taxpayer's interest was "vested" or "contingent."

The rule embodied in the Treasury Regulations is supported by other considerations, including (1) that the general statutory scheme contemplates that there be no gap in the continuity of the basis following the decedent's death; (2) that the application of a Federal tax statute should not depend upon the variations and complexities of local law, especially where the resulting distinctions involve merely form rather than substance; and (3) that no substantial basis can be advanced for making a distinction between "vested" and "contingent" interests.

II. For securities which were purchased by the trustee, the basis for computing gain or loss is the cost to the trustee, under Section 113 (a) of the Revenue Act of 1934, and not the value on the date of delivery by the trustee to the taxpayer.

The general provision establishing cost under Section 113 (a) is applicable and not the exception under Section 113 (a) (5). The phrase "acquired by bequest, devise, or inheritance" in Section 113 (a) (5) does not apply to property purchased by testamentary trustees. This issue is plainly controlled by the *Maguire* decision, *supra*.

To construe the statute as permitting the taxpayer to use as a basis value at time of distribution at the termination of a testamentary trust would create a period, frequently of lengthy duration, during which changes in value would be without tax

effect. Similarly, it would enable a trustee to sell trust property or distribute it in kind, according to which course would secure an advantageous basis for determining gain or loss.

ARGUMENT

I

FOR SECURITIES WHICH HAD BEEN OWNED BY THE DECEDENT, THE TIME OF ACQUISITION BY THE TAXPAYER, UNDER SECTION 113 (a) (5) OF THE REVENUE ACT OF 1934, WAS THE DATE OF DECEDENT'S DEATH

Section 113 (a) (5) of the Revenue Act of 1934, Appendix, *infra*, p. 32, provides that where property is "acquired by bequest, devise, or inheritance," then "the basis shall be the fair market value of such property at the time of such acquisition." Treasury Regulations 86, Appendix, *infra*, pp. ³¹⁻³³ ~~32-34~~, interpreting this provision, hold that the "time of such acquisition" is the date of death of the decedent, regardless of whether the interest of the taxpayer was "vested" or "contingent" at such time.

Both the taxpayer and the court below conceded that if the taxpayer's interest were "vested" at the date of his father's death, then that date would be the date of "acquisition" within the meaning of Section 113 (a) (5). This follows plainly from the decision of this Court in *Brewster v. Gage*, 280 U. S. 327, discussed hereinafter. However, the court below held that the interest of the taxpayer

here involved was "contingent" under North Carolina law,² and that therefore the time "acquisition under the statute was the date the contingency was finally resolved—i. e., the date of actual delivery to the taxpayer when he became 28 years of age.

A brief survey of the legislative history of Section 113 (a) (5) shows that Congress intended to make no such distinction between "vested" and "contingent" interests. Under Treasury Regulations interpreting the Revenue Act of 1918³ and by express provision of the Acts of 1921, 1924, and 1926 "the time of * * * acquisition" was the critical date for valuing property passing at death. Considerable litigation arose as to the meaning of the phrase and as a consequence the statutory provisions were amended in the Revenue Act of 1928.⁴ As introduced in the House, the bill which became the Revenue Act of 1928 (H. Rept. No. 1, 70th Cong., 1st Sess.) provided, in Section 113 (a) (5), that the basis for all property acquired by bequest, devise, or inheritance should be the value of the property at the date of decedent's death. The Senate Committee, declaring the House ver-

² The question of whether the taxpayer's interest was "vested" or "contingent" under North Carolina law is not before this Court, that issue being expressly excluded by the order granting certiorari (R. 57).

³ Regulations 45, Article 1562.

⁴ H. Rept. No. 2, 70th Cong., 1st Sess., p. 18; S. Rept. No. 960, 70th Cong., 1st Sess., p. 26.

sion inadequate in certain minor situations,⁸ rewrote the provision in the form finally passed.⁹ As this Court said in *Maguire v. Commissioner*, No. 346, this Term, "There does not appear to be the slightest suggestion that this change was designed as a substantial departure from the value-at-death rule."¹⁰

The language of the 1928 Act was retained in the Act of 1932.¹¹

In the meantime, however, this Court decided *Brewster v. Gage*, 280 U. S. 327. That case involved personal property acquired by a residuary legatee and sold in 1921 and 1922, and was decided under the Revenue Acts of 1918 and 1921. As just stated, the latter Act, and the regulations under the former Act, specified value at the time of "acquisition" as the basis for property acquired by bequest, devise, or inheritance. The Court held that the time of "acquisition" was the date of the

⁸ The Senate Committee Report shows that the situations it had in mind arose where the executor purchased property after the death of the testator and where property was transferred in contemplation of death, the donee selling the property while the donor was still living. S. Rept. No. 960, 70th Cong., 1st Sess.

⁹ In cases of specific bequest of personality or a general or specific devise of realty, or the transmission of realty by intestacy, the basis was to be the value at the time of the death of the decedent. In all other cases the basis was the value of the property at the time of distribution to the taxpayer. 45 Stat. 791, 818.

¹⁰ 47 Stat. 169, 199.

decedent's death, and not the date the executors distributed the property.

In the Revenue Act of 1934, Congress returned to the form used in the Acts prior to 1928, namely, the value "at the time of . . . acquisition." It did so because it considered that the decision in *Brewster v. Gage, supra*, settled the proposition that "time of acquisition" meant the date of death of the decedent in all cases of property passing by bequest, devise, or inheritance. The reports of the House and Senate Committees explain the reversion to the previous provision as follows:

Section 113 (a) 5 of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term "date of acquisition", which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster v. Gage*, 280 U. S. 327.) Section 113 (a) 5 of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal. (H. Rep. No. 704, 73d Cong., 2d Sess., p. 28; S. Rep. No. 558, 73d Cong., 2d Sess., p. 34.)

Following the passage of the 1934 Act, Treasury Regulations 86 expressly interpreted Section 113 (a) (5) as follows:

Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents.

The provision, as thus interpreted, has been re-enacted without change in ensuing years and remains unchanged at this time.* Under the familiar rule of construction, this Regulation, prospective in application, must be deemed to have legislative approval and should not be lightly disregarded. *Brewster v. Gage*, 280 U. S. 327, 337; *Hartley v. Commissioner*, 295 U. S. 216; *Helvering v. Winmill*, 305 U. S. 79.

* Internal Revenue Code, Section 113 (a) (5). The Treasury Regulation has been repeated in Treasury Regulations 94 and 101, Article 113 (a) (5)-1 (promulgated under the Revenue Acts of 1936 and 1938, respectively); Treasury Regulations 103, Section 19.113 (a) (5)-1 (promulgated under the Internal Revenue Code).

Thus the uniform use of the phrase "time of such acquisition" in Treasury Regulations and Revenue Acts prior to 1928; the clarification proposed by the House Committee in the 1928 bill which specifically fixed the time of acquisition as the date of the decedent's death; the modification proposed by the Senate Committee, and finally passed, which was clearly not intended to make any substantial change in the value-at-death rule; the decision in *Brewster v. Gage*; the reversion in 1934 to the phrase "time of such acquisition," expressly made because the Supreme Court was believed to have clarified the phrase by the *Brewster* decision to mean "the date of death in the case of all property passing by bequest, devise and inheritance;" the issuance of Treasury Regulation 86 interpreting the provision as applying irrespective of the nature of the remainderman's interest; the reenactment of the provision without change, and in the face of this interpretation, in subsequent Revenue Acts; the complete absence of any suggestion throughout that Congress intended to make any distinction between "vested" and "contingent" interests as affecting the date of acquisition—all these factors, in our opinion, make clear that the interpretation here contended for is that which was contemplated and sanctioned by Congress.

The court below, in discussing the legislative history of Section 113 (a) (5), relied upon certain

Office Decisions of the Treasury Department¹⁰ and upon certain decisions of the lower Federal courts¹¹ as showing that, prior to the enactment of the 1934 Revenue Act, the provision had come to mean that if the interest of the remainderman was contingent the basis of valuation was the date of resolution of the contingency. It is argued that, in restoring the provision in the 1934 Act, Congress must have meant to incorporate this meaning.

It should be observed, however, as this Court has held, that Office Decisions have none of the force and effect of Treasury Decisions and do not commit the Department to any interpretation of the law.¹² On the other hand, Treasury Regulations applicable to the Acts prior to 1928 consistently stated that the basis of property acquired by bequest, devise, or inheritance should be the value at date of such acquisition, making no distinction between "vested" and "contingent" interests.¹³

¹⁰ O. D. 727, 3 Cum. Bull. 53 (1920); G. C. M. 10260, XI-1 Cum. Bull. 79, 80.

¹¹ Particularly *Pringle v. Commissioner*, 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Lane v. Corwin*, 63 F. (2d) 767 (C. C. A. 2d), certiorari denied, 290 U. S. 644.

¹² *Helvering v. New York Trust Co.*, 292 U. S. 455, 468. See the cautionary notice published on the face of the bulletins containing these rulings. See, also, *Biddle v. Commissioner*, 302 U. S. 573, 582.

¹³ Treasury Regulations 33 (1918 Revision), Article 4, Par. 44 (1916 Act); Treasury Regulations 45, Article 1562 (1918 Act); Treasury Regulations 62, Article 1563 (1921 Act); Treasury Regulations 65 (1924 Act) and 69 (1926 Act), Article 1594.

With regard to the *Pringle* and *Lane* decisions, upon which the court below relied, it should be noted that there is no evidence Congress took such decisions into consideration in making the change back to the present provision in the 1934 Act. On the contrary, the Committee Reports, quoted *supra*, indicate quite clearly that Congress considered the Supreme Court decision in *Brewster v. Gage* as ending ambiguity and establishing a uniform rule that time of acquisition meant date of death in all cases of property acquired by bequest, devise, or inheritance.

Under these circumstances, and in view of the considerations set forth below, the enactment of the provision in the Act of 1934, after the intermediate Acts of 1928 and 1932 had contained different provisions, left the Treasury Department free to adopt reasonable regulations of interpretation. Certainly the informal departmental rulings referred to above had not become "frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers". *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100-101; *Morrissey v. Commissioner*, 296 U. S. 344, 355; *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 303, 306-307. And beginning in 1934 the regulations have expressly provided that property acquired by

bequest, devise, or inheritance is acquired at the decedent's death, whether the taxpayer's interest was then vested or contingent. It is noteworthy that, contrary to the court below, the two other Circuit Courts of Appeals passing upon the question as raised in the 1934 Act and subsequent Acts have upheld the Treasury Regulation.¹³

In any event, the issue is now settled by the recent decisions of this Court in *Maguire v. Commissioner*, No. 346 this Term, *Helvering v. Gambrill*, No. 472 this Term, and *Helvering v. Campbell* and related cases, Nos. 473, 474 and 475, this Term, all decided March 31, 1941.

The *Maguire* case involved property received by the taxpayer pursuant to a testamentary trust similar in all essential respects with that involved in the case at bar.¹⁴ The *Maguire* case arose, how-

¹³ *Van Vranken v. Helvering*, 115 F. (2d) 709 (C. C. A. 2d), pending on petition for certiorari, No. 836 this Term; *Cary v. Helvering*, 116 F. (2d) 800 (C. C. A. 2d), and related cases, pending on writs of certiorari, Nos. 734-737 this Term; *Archbold v. Helvering*, 115 F. (2d) 1005 (C. C. A. 2d), and related cases, pending on petitions for certiorari, Nos. 792-795 this Term; *Augustus v. Commissioner* (C. C. A. 6th) decided February 14, 1941, not yet officially reported but found in 1941 C. C. H. Vol. 4, Par. 9255, pending on petition for certiorari, No. 819, this Term.

¹⁴ The will, pursuant to which the taxpayer received the property, directed the executors and trustees, not less than ten and not more than twenty years after the death of the testator, to make final distribution of this residue as follows: " * * * to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such

ever, under Section 113 (a) (5) of the Revenue Act of 1928, which provided that as to personalty acquired by general bequest the basis of valuation was the value "at the time of the distribution to the taxpayer." The Court held that this meant the value when received by the trustees from the executors and not the value at the date of delivery by the trustees to the taxpayer. The underlying basis for the decision was that Congress had not intended in Section 113 (a) (5) of the 1928 Act to depart substantially from its "value-at-death" principle as expressed in Acts prior to 1928, in other provisions of the 1928 and 1932 Acts, and in the Acts subsequent to 1932. Since the Acts prior to 1928 and subsequent to 1932 fixed the basis for valuation at the "time of * * * acquisition" it follows that the Court considered this to mean the date of death, regardless of whether the taxpayer's interest was conditional or contingent. This is apparent throughout the Court's opinion. Thus, speaking of the rights established under the trust in the *Maguire* case, the Court says:

"Distribution to the taxpayer" is not necessarily restricted to situations where property is delivered to the taxpayer. It also aptly describes the case where prop-

distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, * * *."

erty is delivered by the executors to trustees in trust for the taxpayer. Such distribution of the estate results in the acquisition by the taxpayer of an equitable estate under the testamentary trust. The fact that he does not then obtain possession or control, the fact that his interest is conditional or contingent, the fact that legal title may not be transferred to him until years later, are immaterial.

With reference to *Brewster v. Gage*, the Court said:

In *Brewster v. Gage*, 280 U. S. 327, 334, this Court held under earlier acts that the date of death was the date of "acquisition" even in case of a residuary legatee whose interest at the date of death clearly was not absolute. That conclusion suggests that the critical date is the time when the legatee acquires some interest in the property although his interest then may not be unconditional.

Other reasons given by the Court for its decision in the *Maguire* case are equally applicable here. Thus, Congress cannot have intended "to allow trustees either to sell the property or to distribute it in kind, as would be most advantageous for tax purposes." Likewise, "we cannot assume in absence of explicit provisions that Congress intended to create substantial periods of time following the date of death during which the value of the property bequeathed would have no incidence as respects subsequent gains or losses."

The *Gambrill* case is even more conclusive. There the taxpayer was a remainderman under the will of his grandmother, who died in 1897.¹⁸ In May 1928 the trustees delivered the *corpus* to the taxpayer. The question arose whether a certain portion of the property owned by the decedent at the time of her death and sold by the taxpayer less than 2 years after May 1928 had been "held by the taxpayer for more than two years" and was therefore a capital asset within the meaning of Section 101 (c) (8) of the Revenue Act of 1928. The Court held that the two-year holding period under

¹⁸ Respondent was the sole surviving issue of his mother, Anna Van Nest Gambrill, and took under the following provisions of his grandmother's will:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

"One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

"The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living."

this Section is to be measured from the date of the decedent's death. This rule applied, the Court expressly declared, whether the taxpayer's remainder was vested or contingent at the time of the testator's death. The Court said:

* * * respondent's interest, albeit a remainder, was acquired at the date of decedent's death for property then owned and at the date of purchase for property purchased by the trustees. The continuity in his holding was not broken by the intervening trust. The formal constitution of that trust though of special significance under § 113 (a) (5) (*Maguire v. Commissioner, supra*) did not change the basic quality of his property interest. And the fact that that interest did not ripen into full and complete ownership except by the passage of time or the occurrence of subsequent events is inconsequential. For § 101 (c) (8) (B) provides, as we have seen, that in determining the taxpayer's holding period there shall be included the period for which the property was held by any other person if under § 113 the property had the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person. It is plain that under § 113 the basis to the trustees was the same as the basis to the taxpayer. Hence the period of their holding is not to be excluded from the period of the taxpayer's holding. That makes plain that "property held by the taxpayer" as

used in § 101 (c) (8) embraces not only full ownership but also any interest whether vested, contingent, or conditional. Otherwise the period of the holding by trustees would not be included in the holding by a mere remainderman. Hence, as in *McFeely v. Commissioner, supra*, we look to the time when the taxpayer first acquired the interest which later ripened into full ownership. It is plain that for property owned by the decedent he acquired that interest at her death and that for property purchased by the trustees he acquired that interest at the date of purchase.

Since, under the ruling in *McFeely v. Commissioner*, 296 U. S. 102, the date for commencement of the holding period is the same as the date of acquisition, the holding in the *Gambrill* case is equivalent to a holding on the precise issue raised by the case at bar.

This Court's decision in the *Campbell* and related cases is also independently conclusive of the present case. There the Court held that, for purposes of the "first-in-first-out" rule, the date of death was the "date of acquisition" for shares which came to the taxpayer from the decedent through a testamentary trust. To the contention of one of the taxpayers that "in view of the conditional nature of his remainder interest he held the securities only from the date when his interest became indefeasible and the securities were distributed to him," the Court said:

As we indicated in *Maguire v. Commissioner, supra*, we are dealing only with a point of reference and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. For that purpose distinctions between vested and contingent remainders or between absolute and conditional property interests have no relevancy. Each remainderman has become the taxpayer because he has obtained possession and control of the property and has sold it. While the property is held in trust, the vested remainderman has no more rights of possession and control than the contingent remainderman. Yet each has acquired a property interest. The statutory provisions here in question come into play when that interest later ripens into full ownership and a sale is made. Hence the value of the property at the time when the taxpayer first acquires an interest in it has relevance to a subsequent determination of the gains or losses.

That the rule of *Brewster v. Gage, supra*, is applicable despite the nature of the taxpayer's interest in this case, the Court made clear:

As we remarked in *Maguire v. Commissioner, supra*, the residuary legatee in *Brewster v. Gage*, 280 U. S. 327, was held to have acquired his interest at date of death though at that time it was not absolute. To be sure,

in these cases the interest of the remaindermen in the property at the earlier time was limited by the very terms of the bequest. But the tax here in question is not on their remainder interests; it is on gains realized by them as owners of that property. Hence, to carry into that computation the earlier value of the property is not to tax them on values which they never received. It merely provides a rule of thumb in alleviation of a tax which would be computed by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer.

It would seem beyond dispute that, particularly in view of the foregoing language, "acquisition" for basis purposes under the Acts other than 1928 and 1932 occurs at the same time as "acquisition" for purposes of the "first-in-first-out" rule. Consequently the holding in the *Campbell* case is again equivalent to a holding on the issue now before the Court.

In each of the above cases, as in the instant case, there was a possibility, as of the death of the decedent, that actual possession and enjoyment might never be realized by the taxpayer. This Court, however, did not concern itself with that question. For in such cases there has actually been a realization before the statute is invoked and the only real issue is the standard of value Congress has established for the determination of gain or loss.

Aside from the legislative history of the provision, and aside from the holdings in the *Maguire*, *Gambrill* and *Campbell* cases, the interpretation of "time of * * * acquisition" adopted by the Treasury Regulations is compelled by other important considerations:

(1) The interpretation embodied in the Treasury Regulations carries out the general statutory scheme that there be no gap in the continuity of the basis following the decedent's death. *Maguire v. Commissioner, supra.* The construction of the statute proposed by the respondent permits avoidance of taxes in cases where the property has changed in value between the date of death and the date of sale. Thus, if an intermediate date is selected as the basis date, part of an increment in value, accruing between the death and the date of sale, can escape taxation altogether.

(2) The application of a Federal tax statute should not depend upon the variations and complexities of local law, especially where the resulting distinctions involve mere form rather than substance. *Lyeth v. Hoey*, 305 U. S. 188, 193-194; *Morgan v. Commissioner*, 309 U. S. 78, 80-81; *Burnet v. Harmel*, 287 U. S. 103. The Treasury rule makes for uniform and simple administration; the respondent's rule entails variety and complexity under many different state laws.

(3) The attempted distinction between vested and contingent remaindermen is illusory for tax

purposes. Each type of remainderman obtains an interest in the property immediately upon the death of the testator. Neither has control over the property while it is in the trustee's hands. The interest of a vested remainderman may be divested by the occurrence of a condition subsequent in essentially the same manner as the interest of a contingent remainderman may be defeated by the failure of a condition precedent. Moreover, even a vested remainderman normally cannot know until the trust terminates that any specific property may be his, since the trustee may sell it at any time. Thus, no real basis exists for any distinction that is significant for tax purposes. See *Helvering v. Hallock*, 309 U. S. 106.

We submit, therefore, that the Treasury Regulation is consistent with the language and structure of the statute, that it is in harmony with the purpose of Congress as shown by the legislative history of Section 113 (a) (5), and that it is squarely supported by the decisions of this Court in the *Maguire*, *Gambrill* and *Campbell* cases.

II

FOR SECURITIES WHICH WERE PURCHASED BY THE TRUSTEE, THE BASIS FOR COMPUTING GAIN OR LOSS IS THE COST TO THE TRUSTEE, UNDER SECTION 113 (a) OF THE REVENUE ACT OF 1934

Some of the property sold by the taxpayer had been bought by the testamentary trustee and was delivered to him on April 4, 1934, when he reached

the age of 28. The Government contends that the basis for computing the gain or loss on the sale of such property is "cost" under the general provision of Section 113 (a) and that the exception to the cost basis in Section 113 (a) (5) is not applicable.

It is clear that Section 113 (a) (5) was not intended to fix a basis for property purchased by testamentary trustees and delivered in kind to the beneficiary. This Section refers to property "acquired by bequest, devise, or inheritance." Property purchased by a testamentary trustee is acquired subsequent to the decedent's death and can not be said to have passed at his death. Consequently Article 113 (a) (5)-1 (d) of Treasury Regulations 86, Appendix, *infra*, p. 34, provides that the basis for property purchased by testamentary fiduciaries shall be the "cost or other basis to the fiduciary" in lieu of the "fair market value at the time when the decedent died."¹⁶

This question has, we submit, been resolved in the Government's favor by the *Maguire* decision, *supra*. There this Court held that securities purchased by testamentary trustees were not acquired "by will or by intestacy" within Section 113 (a) (5) of the 1928 Act, and that therefore their basis

¹⁶ To the same effect is Article 113 (a) (5)-1 (d) of Treasury Regulations 94 and 101, promulgated under the Revenue Acts of 1936 and 1938, respectively; Section 19.113 (a) (5)-1 (d) of Treasury Regulations 103, promulgated under the Internal Revenue Code.

was "cost" under Section 113 (a). While the 1934 Act (and the Acts before 1928) employs the phrase "by bequest, devise, or inheritance", these words are plainly synonymous with "by will or by intestacy." The title of Section 113 (a) (5), "Property transmitted at death," relied on in the *Maguire* decision, is the same in both Acts, and the different terminology in the 1928 Act is obviously but a chance result of the rephrasing incident to according separate treatment to realty and to specific bequests of personality.

Other considerations upholding the Treasury Regulation may be stated briefly:

That Section 113 (a) (5) should not be construed to include property purchased by testamentary trustees which the decedent never owned is evident from a comparison of Section 113 (a) (5) and (a) (3) of the Revenue Act of 1934. The latter subsection provides:

If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, * * *.

If the trustees of an *inter vivos* trust, pursuant to a power of investment and reinvestment, sold trust property and purchased other property with the proceeds, this Section could not be applied to the property so purchased by the trustees, since that property had no basis "in the hands of the

grantor." The proper basis for property so purchased by the trustee, whether in the hands of the trustee or of the beneficiary, is cost to the trustee.

The taxpayer's contentions and interpretation open an avenue for tax avoidance. If the trustees themselves sold property which they had purchased, the basis would necessarily be cost. To hold that a different basis prevails for the property in the hands of the beneficiaries would enable trustees either to sell the property or to distribute it in kind, as would be advantageous for tax purposes. Such a result is plainly unsound.

The court below stated that if Section 113 (a) (5) of the 1934 Act did not apply to a fiduciary's purchase, then no statutory provision was applicable. On the contrary, the general rule laid down in Section 113 (a) that "The basis of property shall be the cost of such property; * * *" is controlling. The rule clearly does not require that the basis shall be the cost to the particular taxpayer who sells the property. But even if it did, it would be fair to assume that the price paid by the fiduciary out of the estate held for the benefit of the taxpayer was cost to the taxpayer. See the *Gambrill* and *Campbell* cases, *supra*.

The court below interpreted Article 113 (a) (5)-1 (d) of Treasury Regulations 86, Appendix, *infra*, p. 24, as applicable only to purchases by fiduciaries acting for decedents who died before March 1, 1913. Even a casual examination of this Regulation shows that such a construction does violence

to both its form and purpose. The second paragraph of the Regulation covers all purchases by testamentary fiduciaries without regard to the date of the decedent's death, and was not intended to be limited by the first paragraph.

Finally, if it be assumed that Section 113 (a) (5) is the applicable provision, then, for the reasons stated in the first part of this brief, the date of valuation would be "the fair market value" at the "time of * * * acquisition," that is, on the date of purchase by the trustee. See the *Gambrill* and *Campbell* cases, *supra*. Such a basis, rather than the cost to the trustee, is plainly unsound. It follows that the applicable provisions must be the general provision of Section 113 (a) and not Section 113 (a) (5).

CONCLUSION

The decision of the court below should be reversed and the decision of the Board of Tax Appeals affirmed.

Respectfully submitted.

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APRIL 1941.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that— *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *
(U. S. C., Title 26, Sec. 113.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 113 (a) (5)-1. *Basis of property acquired by bequest, devise, or inheritance.*—

(a) *Property included.*—Section 113 (a) (5) applies—

(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents; and

(2) to property passing under an instrument which, under section 113 (a) (5) is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113 (a) (5).

(b) *Basis.*—Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even

though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113 (a) (5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is its fair market value at the time when the decedent died, and not when the legatee actually received the property; or, if the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received, in the hands of the trustees, is its fair market value at the time when the decedent dies; or, if the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died.

The purpose of the Act, in prescribing a single uniform basis rule for property acquired by bequest, devise, or inheritance, is, on the one hand, to tax the gain, in respect of such property, to him who realizes it (without regard to the circumstance that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession or enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which Section 113 (a) (5) recognizes as the measure of gain or loss.

(d) *Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113 (a) (14).

If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died.